

STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

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In the Matter of Level 3 Communications,)	
LLC's Petition for Arbitration Pursuant to)	
Section 252(b) of the Communications Act of)	Case No. 04-0428
1934, as amended by the Telecommunications)	
Act of 1996, and the Applicable State Laws for)	
Rates, Terms, and Conditions of)	
Interconnection with Illinois Bell Telephone)	
<u>Company d/b/a SBC Illinois</u>)	

**LEVEL 3 COMMUNICATIONS, LLC'S
MOTION TO COMPEL SBC ILLINOIS
TO PROVIDE FULL DISCOVERY RESPONSES**

COMES NOW Level 3 Communications, LLC ("Level 3"), by its attorneys, pursuant to Part 200.370 of the Commission's Rules of Practice, 83 Ill. Admin. Code § 200.370, and hereby files this Motion to Compel Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC") to Provide full responses to outstanding discovery requests. In support of this Motion, Level 3 states as follows:

BACKGROUND

1. On June 8, 2004, Level 3 filed its Petition for Arbitration with this Commission, including Exhibit D to the Petition which was Level 3's First Set of Discovery Requests.
2. Under the provisions of Supreme Court Rules 213 and 214, a party has a duty to reasonably supplement or amend any prior discovery response.
2. On June 15, 2004, SBC provided Level 3 with responses to the discovery requests that SBC purports to be complete. *See*, SBC Illinois' Objections and Responses to Level 3 Communications, LLC's First Set of Data Requests, relevant portions are attached hereto as

Exhibit A. Further, on June 18, 2004, as a result of the meet and confer discussed below, SBC provided certain supplemental responses to the discovery requests, attached hereto as Exhibit B.

3. As discussed below, Level 3 believes that certain of the responses are inadequate and that there are documents that have not been submitted in response to the requests.

4. Prior to filing this Motion, counsel for Level 3 attempted to reach accord with SBC, but to no avail. On June 16, 2004, counsel for the parties met to discuss the discovery dispute. Counsel for the Parties have also exchanged a number of emails on the subject since that time. In spite of these conversations and contacts, the parties were unable to reach accord with respect to the discovery disputes contained herein.

I. THE ICC RULES OF PRACTICE REQUIRE FULL AND COMPLETE DISCLOSURE OF RELEVANT AND MATERIAL FACTS

5. It is the stated goal of the Illinois Commerce Commission to encourage full and total disclosure of discovery issues. Part 200.340 reads as follows:

It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding. Further, it is the policy of the Commission to encourage voluntary exchange by the parties and staff witnesses of all relevant and material facts to a proceeding through the use of requests for documents and information. Formal discovery by means such as depositions and subpoenas is discouraged unless less formal procedures have proved to be unsuccessful. It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding.

83 Ill. Admin. Code § 200.340.

6. A party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the proceeding. Ill. S. Ct. R. 201(b)(1), 83 Ill. Adm. Code § 200.340. Under Illinois law, a party has an ongoing duty to supplement its responses to interrogatories and requests for documents. *See, e.g.,* S. Ct. R. 213, 214.

7. Any interrogatories or requests for documents related to the issues raised in the Petition are relevant to this proceeding.

II. SBC MUST BE COMPELLED TO PROVIDE FULL RESPONSES TO THE DISPUTED DISCOVERY REQUESTS.

8. Level 3 believes that SBC has not provided complete and thorough responses to certain of the interrogatories and document requests.

9. In an attempt to make the Arbitrator's review of this Motion as simple as possible, Level 3 has attempted to lump together all related disputes. In total, Level 3 raises 13 different disputes related to 16 different discovery requests.

DRs 4 and 5- Level 3 sought SBC to list all hazardous substances that are present at the SBC facilities into which Level 3 will likely collocate, and all documents related to those materials. As detailed in the Petition, SBC's proposed language related to Hazardous Materials imposes financial liability on Level 3 when either SBC or some other third party of which Level 3 has no relationship introduces a Hazardous Material in to the collocation area. This request is geared towards discovering what Hazardous Materials are currently present in the SBC facility so the Commission will understand the gravity of SBC's proposal. To be clear, in the event that Level 3 determines to collocate equipment in SBC's facilities, SBC's proposals would impose on Level 3 liability for all Hazardous Materials that are found in the facility, including, Halon Gas for fire suppression, asbestos, oil, gas, diesel, underground storage tanks, industrial cleaners, etc. Even though Level 3 took no part in bringing these substances into the facility, and even though the substances may have been introduced years prior to Level 3's collocation, SBC would have Level 3 undertake financial liability. As such, a request seeking to ascertain exactly what sort of Hazardous Materials already exist in the facility is relevant and likely to lead to the discovery of admissible issues.

DR 6 - Level 3 sought information related to the past due amounts that SBC believes Level 3 owes to SBC for remediation of hazardous waste, network elements or any other account. SBC's response made no mention of any hazardous waste amounts claimed due. At the meet and confer, counsel requested SBC clarify whether the failure to address hazardous waste in the response was an oversight, or if there is no outstanding amount claimed. In the June 19, 2004 Supplement, the revised answer made no clarification. As such, Level 3 is still in the dark as to whether SBC claims any past due amounts for Hazardous Materials. In order to protect its interest, Level 3 raises this matter in this Motion. In the event that SBC provides adequate response prior to oral argument, Level 3 will notify the ALJ.

DR 7 - Level 3 sought SBC to identify and provide copies of all contracts, agreements, etc. reflecting the circumstances under which SBC has secured a deposit or other assurances of payment from CLECs after January 2001. SBC's initial response merely referred Level 3 to "the effective interconnection agreements SBC Illinois has entered into with other parties in this state, copies of which are publicly available." Level 3 objected to SBC's failure to provide any responsive material to the request, as merely stating the existence of publicly-available documents does not rise to the threshold of obtaining "full disclosure of all relevant and material facts to a proceeding." 83 Ill. Admin. Code Part 200-340. Via email dated June 18, 2004, SBC provided a supplemental response to the request, with an electronic link to the ICC's web page that purportedly provides an electronic copy of all responsive contracts, after "a little bit of searching". A copy of that email supplemental response is attached hereto as Exhibit C.

The issue of the appropriate deposit or other assurance of payment is clearly an issue raised in this arbitration. As is clearly seen in the Petition, Level 3 raises these terms as Issue No.11. Thus, any claim that the material is not relevant is without merit. Further, SBC's supplemental response fails to provide any actual substantive response at all. Rather than providing a copy of the actual terms and agreements as requested, SBC merely points to an online searching mechanism. Even more objectionable, though SBC relies on this online search vehicle as its substantive response to the request, SBC fails to provide any search guidelines at all – i.e., no party names, no docket numbers, etc.. In other words, SBC has still failed to provide any substantive response to the request. SBC should be required to provide electronic or paper copies of responsive documents.

DR 8 - One of the issues before the Commission in this arbitration is the ability of SBC to impose threat of disconnect for failure to pay alleged amounts due. Under SBC's proposal, SBC could disconnect Illinois customers for amounts allegedly unpaid for California services, irrespective of whether Level 3 has disputed that California bill. This request is drafted towards discovering whether SBC has ever been accused of or investigated for improperly threatening to disconnect services for allegedly not paying for services. As such, it is relevant and likely to lead to discovery of admissible evidence.

Further, it is improper for SBC to fail to respond to the request merely by making a reference to "publicly available information" without providing even a docket or reference number, much less the location of such publicly available information. SBC should be compelled to clearly and articulately identify and provide the location of the data it believes to be responsive, as well as either the citation of orders or docket numbers of the responsive data.

In its revised response to DR 8, SBC states that it is not aware of any such proceeding before the Illinois Commerce Commission. Left unsaid in SBC's response is whether such investigations or complaints have ever been raised in any of the other 12 states in which SBC operates as an ILEC. The request certainly seeks such information, and SBC has failed to address the request.

DR 9 - SBC's response to this request contains information, which SBC claims to be confidential and refuses to provide to Level 3 until a Confidentiality Agreement is signed. The Parties have met and attempted to reach agreement on the terms of such an Agreement, but have reached an impasse on a single issue. Simultaneous to the filing of

this Motion to Compel, Level 3 has filed a Motion for a Protective Order, which provides the positions of the parties on this single issue, and a copy of a proposed Protective Order. Level 3 includes DR 9 in this Motion to Compel in order to protect its rights with respect to the Motion for Protective Order. Until Level 3 has had the opportunity to review the confidential material, it is not in a position to know whether the response is adequate.

DR 11 - Level 3 sought a list of “those SBC end offices in the state in which the SBC affiliate ISP has collocated equipment ...” SBC’s revised response asserts that “the SBC ISP affiliates in Illinois have no collocation space in the SBC Illinois’ central offices.” This is an unresponsive answer to the request. Level 3 did not seek whether SBC’s ISP affiliate had “collocation space” in Illinois as that term is defined in the Federal Act. Rather, the request seeks a list of those end offices in which SBC’s ISP affiliates’ keep equipment, irrespective of whether such equipment is collocated or not. Further, the request is directly related to the issue of whether SBC requires its own ISP affiliate to be physically located in each local calling area, as SBC would force Level 3 to do. It is relevant to the issues before the Commission, and is likely to lead to admissible evidence. As such, SBC should be compelled to fully respond to the request.

DR 12 - Just as with DR 11 above, in this request, Level 3 is attempting to ascertain whether the SBC ISP affiliate has a physical presence in the local calling areas. This is relevant because SBC is attempting to promote language in its version of the Interconnection Agreement that would prohibit Level 3 from deeming as a local call those calls terminating at an ISP via FX or FX-like services. A full response will confirm whether SBC is treating its affiliated ISP different than the manner in which it seeks to treat Level 3, as the response will confirm whether SBC’s affiliated ISP has a physical presence in every local calling area. The issue of whether SBC treats its affiliated ISP different by allowing it to complete a local call to a terminating customer in a different local calling area is relevant to the nature in which it seeks to treat its competitor and, as such, SBC should be compelled to provide full response to the request.

DRs 16, 17 and 18 - Each of these requests included information related to SBC’s plans for providing Internet Enabled services, including VoIP, to its customers either through itself, its own IP affiliate or through a third party. In its responses, in addition to the standard burdensome and relevancy objections, SBC objects to providing any information that is in the custody or control of its affiliated ISP provider. It is clear that the Internet enabled traffic, including VoIP, is a Tier I issue in the arbitration (see, Issue 6), so any claim of relevancy is without merit. With respect to the objection over providing information from its affiliate, that, too is without merit. The requests are designed to obtain discovery on the manner in which SBC treats either itself or its VoIP affiliate, and whether that treatment will vary from the manner in which SBC seeks to treat Level 3.

DRs 20 - Level 3 seeks information related to the process by which SBC allows a CLEC to combine all of its traffic (i.e., local, intraLATA or InterLATA) onto a single trunk. Again, Level 3 raised this dispute as Issue 2 in the Petition. The request is

relevant to that Issue 2 and will allow the Commission to understand whether SBC will allow for trunks with combined types of traffic in other states and, if so, why SBC refuses to do so for Level 3 in Illinois. On review of SBC's response, it appears that SBC does not understand the question presented. To be clear, it is Level 3's intent that these requests seek information on which states SBC allows a CLEC to combine its traffic on a single trunk. SBC's response, however, focuses on whether SBC would combine such traffic on behalf of the CLEC. Level 3 has served a letter on SBC's counsel clarifying the request. In the event that SBC provides responsive information prior to oral argument on this Motion, Level 3 will contact the service list and ALJ.

DR 23 - Level 3 seeks an explanation of the various systems SBC has put in place so that it are able to track CLEC local versus non-local traffic. In its June 18, 2004 revised response, SBC states that it has a proprietary message processing systems to distinguish between local and intraLATA toll traffic. SBC provides no further information or documents that detail the message processing systems, as Level 3 requested. The issue of using a single trunk for both local and non-local traffic is directly raised in the Petition in Issue 2, and is one of the biggest single disputes between the Parties. The request is relevant, and the Commission must compel SBC to provide the Commission and Level 3 with a detailed explanation of the message processing systems it mentions in its revised response (as well as any other such systems, if they exist), and provide any related documentation describing the systems.

DR 26 - Level 3 seeks an explanation from SBC as to whether SBC believes the costs of originating a call to a Level 3 customer differs based on the physical location of the Level 3 customer. SBC refuses to provide a substantive response, rather asserting the question to be premature, vague, ambiguous and irrelevant. SBC has provided no explanation of its assertion that the request is premature, so Level 3 is not able to fully respond to this objection at this time.

As for the remaining objections, none of them sustain scrutiny. It is Level 3's standpoint that this request is directly related to SBC's position that local calls must originate and terminate within the same local calling area (i.e., the originating and terminating customers must be physically located in the same local calling area). As such, an explanation of whether SBC believes the costs to vary based on the physical location of the calling parties is relevant to the issues raised in the proceeding, and SBC should be compelled to make a full response to this request.

DR 28 - Level 3 seeks information related to SBC's provisioning of FX services in Illinois. It is without a doubt that the issue of the appropriate manner in which to treat FX traffic is within the scope of this arbitration. SBC has taken the position that the definition of local call for purposes of Inter-carrier Compensation is based on the physical location of the calling parties, and that access charges may be imposed for these types of FX calls. However, Level 3 would note that SBC's tariffs treat FX calls as local in nature, even though the terminating customer is not in the same local calling area as the originating customer. In contrast, SBC seeks to force Level 3 to treat FX calls as non-local for purposes of inter-carrier compensation, thus forcing Level 3 to pay access charges. This request is aimed at ascertaining some relevant information related to

SBC's use of FX services and the number of ISPs to whom SBC provides such service. The request is relevant and likely to lead to the discovery of admissible evidence. As such, SBC should be compelled to provide a full response to the request.

DRs 30 - Similar to DR 28, Level 3 seeks information related to the manner in which SBC provides FX-like services in Illinois. DR 30 relates to the larger issue of Inter-carrier Compensation for local calls, and is designed to discover whether adopting SBC's proposed positions would result in SBC discriminating against Level 3. For instance, a full response to DR 30, will allow the Commission to determine whether SBC forces its own operations to pay Inter-carrier Compensation for FX-like calls, as SBC would have Level 3 do in its proposed language. Again, this request addresses whether SBC's proposed language would have a discriminatory impact against Level 3 as alleged in the Petition. It is relevant, and the Commission must compel a full response.

Also, Level 3 wants to clarify that it considers Primary Rate Interphase ("PRI") to be a FX-like retail service. PRI allows a customer to establish a particular telephone number throughout the entire LATA, and have all calls originating and terminating to that particular number deemed local. For instance, a customer can obtain an area code 312 number, and have all traffic originating in the Chicago LATA routed to that 312 NPA number and deemed local, even if the physical location of the calling parties is in different local calling areas.

10. In light of these disputes and SBC's continuing refusal to provide complete and thorough responses, Level 3 now seeks the Commission's assistance in ordering SBC to provide full and complete responses to Level 3's First Set of Data Requests as outlined herein.

11. As this is an arbitration proceeding, the time frame for testimony and hearings is greatly reduced. As a result of SBC's failure to adequately provide full responses to the above requests, Level 3 has already been precluded from including any of the responsive material in its Direct Testimony, due on June 22, 2004. As such, Level 3 respectfully requests the ALJ establish a schedule calling for arguments on the merits no later than Wednesday June 23, 2004.

WHEREFORE, for the above stated reasons, Level 3 Communications, LLC respectfully requests this Commission to enter an order compelling SBC to provide full and comprehensive responses to the above disputed requests as soon as practicable, but in no even more than two (2) days.

Respectfully submitted,

LEVEL 3 COMMUNICATIONS, LLC.

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